EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

JAN 16 1985

No. 84-6270

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v.

AGNES MARY MONSOUR, individually and in her official capacity as Director of the Michigan Department of Social Services,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 22, 1984.

## QUESTION PRESENTED

In an action under 42 USC §1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

## LIST OF PARTIES

All parties are listed in the case caption. Named plaintiff Gail Blessing was dismissed as to some claims and intervening plaintiff Johnny Greene was added in the District Court. Counsel have lost contact with named plaintiffs Michael and Linda Kelley, Amelia Van Burger, Mary Jones, and John Kiever, but they remain members of the proposed class. Defendant John T. Dempsey's successor in office as Director of the Michigan Department of Social Services is Agnes Mary Monsour.

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## OPINIONS BELOW

The opinion of the Court of Appeals appears at 742 F2d 277 (6th Cir. 1984). A copy is included in the attached appendix. The opinions of the District Court for the Eastern District of Michigan were not published; copies are included in the appendix.

## JURISDICTION

The judgment of the Court of Appeals for the 6th Circuit was entered on August 22, 1984. A timely petition for rehearing en banc was denied on October 18, 1984, and this petition for certiorari was filed within 90 days of that date. Jurisdiction in the District Court was based on 28 USC 1331 and 1343(3), and this Court's jurisdiction is invoked under 28 USC §1254(i).

## APPLICABLE PROVISIONS OF LAW

1. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## STATEMENT OF THE CASES

A.

Plaintiffs, Michigan Welfare Rights Organization (MWRO) and Gail Blessing, filed a class action complaint on April 11, 1980, seeking relief primarily under 42 USC §1983, and challenging certain policies of defendant, the Director of the Michigan Department of Social Services (MDSS), relating to the provision of day care benefits for employed Aid to Families with Dependent Children (AFDC) recipients.

Plaintiffs alleged in count I of their complaint that by wrongfully refusing to deduct from plaintiffs' incomes child care costs necessitated by working parents' needs to be at their

places of employment, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. In count II, plaintiffs asserted that in failing to inform them properly of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits, defendant was violating not only federal regulations but also the due process clause of the Fourteenth Amendment. Plaintiffs' third claim for relief alleged a denial of equal protection as a result of the acts alleged in count I.

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income any expenses reasonably attributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant's refusal to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income violated Shea v. Vialpando, 416 US 251 (1974).

Effective October 1, 1981, Congress amended the relevant portion of the Social Security Act, 42 USC §602(a), to provide that the state agency shall disregard from earned income expenditures, not exceeding specified amounts, required to be incurred for care of a dependent child. See Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357-933 (1981). Defendant implemented policies, also effective October 1, 1981, consistent with these amended provisions.

After the statutory change, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. Plaintiffs sought an order against defendant state official requiring the issuance of a notice similar in content to that approved by the Supreme Court in Quern v. Jordan, 440 US 332 (1979). Defendant moved to dismiss, arguing that the federal law change had rendered the pre-October 1, 1981, claims moot and that the Eleventh Amendment barred any other relief, including an order requiring issuance of a Quern-type notice to persons who had lost benefits as a result of defendant's actions.

On June 22, 1982, the District Court denied plaintiffs' motions for summary judgment and class certification and dismissed the case. The Sixth Circuit affirmed, holding that the case was not moot, but that the Eleventh Amendment barred the requested relief. See 742 F.2d 277 (6th Cir. 1984).

B.

On May 11, 1981, Carol Banas and eight other named plaintiffs filed a class action complaint, seeking relief primarily under 42 USC §1983, and challenging in count I of their complaint the constitutionality of a section of the Michigan Poor Law, which, along with policies of the defendant Director of the MDSS, required that income of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who lived in the same household as the stepparent. Plaintiffs claimed the statute and policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto.

Plaintiffs asserted in count II an equal protection violation as a result of a section of the Michigan Poor Law that allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits

than was required of stepparents of stepchildren who were not eligible for AFDC benefits. In count III plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiff's rights of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they were already married and by encouraging prospective stepparents not to marry.

Plaintiffs contended in count IV that defendant's policies permitted dependent children and their caretaker relatives, except for stepparents, to deduct from gross earned income all actual expenses of producing that income. State regulations were alleged to require eighty percent of the gross earnings of a stepparent to be automatically counted as available income without allowing for any work expense deductions. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

On May 28, 1981, plaintiffs filed a motion for a preliminary injunction, seeking to enjoin defendant from enforcing the challenged policies and practices regarding stepparents' incomes. The District Court granted plaintiffs' motion for a preliminary injunction, and the Sixth Circuit denied the defendant's request for a stay.

Effective October 1, 1981, and before the appeal on the merits from the District Court's preliminary injunction could be heard, Congress amended the relevant portion of the Social

Security Act, 42 USC §602(a), to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC. As a result of this change in federal law, the District Court amended the preliminary injunction by stipulation and the defendant voluntarily dismissed his appeal of the preliminary injunction.

Plaintiffs then filed a motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in Quern v. Jordan, 440 US 332, 99 S.Ct 1139, 59 L.Ed 2d 358 (1979). Defendant filed a motion to dismiss the action, arguing that plaintiffs' action was mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the relief sought by plaintiffs.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying plaintiffs' motions for summary judgment and class certification and granting defendant's motion to dismiss the action. The Sixth Circuit affirmed, holding that the Eleventh Amendment barred the requested relief. See 742 F2d 277 (6th Cir. 1984).

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There is little doubt that in both cases the Plaintiffs would prevail on the merits of their claims that the Defendant's actions prior to October 1, 1981, violated then-existing federal law on child-care deductions (MWRO) and stepparent income (Banas). See Shea v. Vialpando, 416 US 251 (1974), (a state welfare plan that fails to allow working AFDC recipients to deduct all actual work expenses from earned income before that income is counted in calculating grant levels violates the Social Security Act); and King v. Smith, 392 US 909 (1968), Lewis v. Martin, 397 US 552 (1970), and 45 CFR §233.90(a)(1) (1981).

(presence of a stepparent in the home affects AFDC eligibility only if stepparents are required to support stepchildren under a state law of general applicability).

Although the substantive issues originally raised by these cases (AFDC child-care deductions in MWRO, and deeming of stepparent income in Banas) have lost some of their importance because of the changes in federal law, the underlying Eleventh Amendment question has not been resolved, and it is a critical one for this Court to address. The Sixth Circuit held that the Eleventh Amendment bars an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations of federal law is possible. Not only is the Sixth Circuit's holding contrary to decisions of this Court and of other Circuit Courts of Appeal, but it creates a far-reaching and unwarranted new restriction on the already limited relief available to federal court plaintiffs in suits brought under 42 USC §1983.

The Eleventh Amendment issue will arise in a host of cases, and especially welfare cases, whenever federal law changes (or defendant state officials voluntarily conform their conduct to federal law) before plaintiffs can get a permanent injunction. Just since October, 1984, when the court below issued its opinion, plaintiffs' counsel are informed that the Sixth Circuit's decision has been raised in pending district court cases in no fewer than four circuits. It is certain that the issue is one of extreme importance, that will not go away and that will often affect the rights and remedies of plaintiff classes consisting of thousands or tens of thousands of welfare recipients. The Sixth Circuit has made a sweeping constitutional change of national importance, and where, as here, the issue is squarely presented, review by this Court is both necessary and appropriate.

## RESTATEMENT OF QUESTION PRESENTED

In an action under 42 USC §1983 against a state officer for violations of federal law, does the Eleventh Amendment bar an injunctive order for notice relief to remedy past violations of federal law when no injunctive relief to restrain future violations is possible?

## ARGUMENT

I. Background of important Eleventh Amendment law.

In Ex Parte Young, 209 US 123 (1908), this Court established the rule that an injunctive suit against a state officer alleged to be acting contrary to federal law "is not one against the State." Pennhurst State School v. Halderman, ___ US ___, 79 L.Ed.2d 67, 79 (1984) (hereafter Pennhurst II); Young, supra, at 160. In such cases, relief is justified, "notwithstanding the obvious impact on the state itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is 'stripped of his official or representative character.'" Pennhurst II, 79 L.Ed.2d at 81, quoting Young, supra, at 160. When federal rights are violated, the doctrine of Young is deemed "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" Pennhurst II, 79 L.Ed.2d at 81, quoting Young, id.

Despite Young, however, this Court has held that "some forms of injunctive relief against state officials for violations of federal law" will be barred. Pennhurst II, 79 L.Ed.2d at 80. The relevant exception to Young involved

in welfare cases is the bar against "awards of retroactive monetary relief." Id. This exception is based upon the case of Ford Motor Co. v. Department of Treasury, 323 US 459, 464 (1945), in which this Court stated

> [W]hen the action is in essence one for recovery of money from the state, the state is a real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

See also Edelman v. Jordan, 415 US 651, 663 (1974).

But not all relief with monetary impact is barred. An injunction which orders state officials to perform certain acts, or to conform their conduct to federal law, is permitted since it imposes only a "prospective financial burden." Pennhurst II, 79 L.Ed.2d at 81. However, when the monetary relief sought is "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of defendant state officials," it is barred. Edelman v. Jordan, supra, at 668.

The decisions in the Jordan litigation-- Edelman v. Jordan, 415 US 651 (1974) and Quern v. Jordan, 440 US 332 (1979)-- show how the Eleventh Amendment bar operates in cases brought to enforce provisions of the Social Security Act governing federal-state welfare programs. In Jordan, as in the cases at bar, the plaintiffs sought to conform the conduct of state officials to the requirements of federal law. Jordan involved allegations that state regulations and practices violated federal law regarding the prompt processing of applications for Aid to the Aged, Blind and Disabled (AABD). In that case, the district court in 1972 entered (1) a declaratory judgment that the state law on processing applications had violated federal law from 1968 up to the date of judgment, (2) an injunction requiring future state compliance with federal law, and (3) an injunction ordering that retroactive benefits be

paid to class members who lost benefits in the past as a result of the violations of federal law. See Jordan v. Weaver, No. 71 C 70, judgment (N.D. Ill., March 15, 1972) and opinion (N.D. Ill., Feb. 4, 1972) discussed in Edelman v. Jordan, supra, at 656. See also Jordan v. Weaver, 472 F.2d 985, 996 (7th Cir. 1973).

In Edelman v. Jordan, supra, this Court held that the third portion of the district court's judgment (the retroactive award) violated the rule of Ford Motor Co. v. Department of Treasury, supra, because, although denominated as equitable relief, such an order was "indistinguishable...from an award of damages against the state." Id at 668. No other part of the district court's judgment was affected by the decision in Edelman. Cf. id at 659 n.7 and Quern v. Jordan, supra, at 347, n.18.[1]

The result after Edelman v. Jordan, then, was that for class members who filed their applications for AABD before the date of the district court's preliminary injunction, the only relief granted was a bare declaratory judgment that state law and policy violated then-existing federal law. The district court, on remand after Edelman, thus viewed its task as fashioning appropriate relief, if any, to provide redress to this group of applicants. See Jordan v. Trainor, 405 F. Supp. 802, 803-804 (N.D. Ill. 1975). At plaintiffs' request, the district court entered

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1. By the time Edelman was decided in this Court, the entire AABD program had been abolished and replaced by the federally administered Supplemental Security Income (SSI) program. See Edelman v. Jordan, 415 US at 653, n.2. Thus the second portion of the district court's judgment (the injunction requiring future compliance with the old federal law) was mooted by the change in law. Nevertheless, the AABD applicants whose rights had been violated in the past were entitled to have their past eligibility determined according to the old law if they sought an administrative remedy. See 45 CFR §205.10(b)(2)(1973) and 45 CFR §205.10(a)(18) (1973-1979). The same time-frame eligibility requirement applies to the claims of class members in the cases at bar. See 45 CFR §205.10(a)(18) (1980-1984). See also 42 USC §602(a)(22) (1982) and 45 CFR §233.20(a)(13)(ii) (1982), (states required to take all necessary steps to correct underpayments of AFDC).

an injunctive order for notice relief. That order required that the defendant state officials send notices to the relevant class members advising them of their right to file a claim for retroactive benefits under the state's administrative hearing procedure. After modifying the content of the notice, the en banc Court of Appeals affirmed the district court. Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977) (en banc), affirmed sub.nom. Quern v. Jordan, 440 US 332 (1979).

In Quern v. Jordan, 440 US 332 (1979), this Court reviewed the propriety of the notice relief ordered and determined that it did not violate the Eleventh Amendment. In Quern, state officials argued that notice relief, like the retroactive award struck down in Edelman, "will inexorably lead to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award." Id at 347. This argument was rejected by the Court, which held that "notice relief does not constitute a money judgment," id at 348 n.20, because it does not compel the state to pay any money:

> [T]he chain of causation [between the notice relief and any eventual award of benefits] is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. ...[T]he mere sending of [the] notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the state, its agencies, courts, and legislature, not with the federal court.

Id at 347-348. Thus, Quern held that notice relief on behalf of a class that has lost benefits in the past in violation of

federal law is a form of injunctive relief that does not violate the Eleventh Amendment. Unlike an award of retroactive benefits, it does not itself compel the state to pay retroactive relief and thus does not cause any forbidden monetary impact on the state treasury.

II. The decision below conflicts with controlling decisions of this Court holding that notice relief is not barred by the Eleventh Amendment.

In the cases at bar, plaintiffs requested precisely the same notice relief awarded by the district court in the Jordan litigation and expressly declared to be permissible under the Eleventh Amendment by this Court in Quern v. Jordan, supra. Despite the identity of the relief requested, the Sixth Circuit below held that an order for notice relief would violate the Eleventh Amendment.

In so holding, the Sixth Circuit relied on two grounds, both of which are insupportable. First, it said that, notwithstanding Young, Edelman, and Quern, the more recent case of Cory v. White, 457 US 85 (1981), stands for the proposition that even prospective injunctive relief is barred against a state officer alleged to have violated federal law. See Banas v. Dempsey, 742 F.2d 277, 287 (6th Cir. 1984). (Appendix at 21.) But Cory is clearly inapposite. Cory was an interpleader action based upon diversity of citizenship in which no violation of federal law was ever alleged. See Cory v. White, supra, at 91. To the contrary, this Court in Cory reaffirmed the rule that the Eleventh Amendment bars even injunctive suits against state officers "unless they are alleged to be acting contrary to federal law...." Id. (emphasis supplied). Of course, if the Sixth Circuit's reading of Cory v. White were correct, Ex Parte Young would have been overruled.

Second, the Sixth Circuit set up a false distinction between the present cases and Quern v. Jordan, supra, and

then relied on it to reach an erroneous conclusion. The difference between Quern and the present cases, according to the Sixth Circuit, was that in the present cases there had been a change in federal law that eliminated any future conflict between federal and state law. See Banas v. Dempsey, supra, at 286-288. (Appendix at 19 .) According to the opinion below, without a viable claim that defendant violated federal law after that law changed, there could be no basis for an order for notice relief to redress any violation before federal law changed. Id.

The problem with this analysis is that it ignores the fact that violations of federal law (whenever they occur) may always be redressed by appropriate injunctive relief, so long as that relief is not barred by the Eleventh Amendment.[2] The point is driven home by the Jordan litigation itself. As noted above, the notice relief requested in Jordan could be sent only to those AABD eligibles whose rights were declared to have been violated in the past. However, by the time (on remand) that plaintiffs first thought to ask for notice relief, the entire AABD program had been abolished, so that no continuing violation of federal law existed. Indeed, by the time the district court granted the relief in 1975, the program had been defunct for over a year, and by the time this Court approved the notice relief in 1979, the program had not existed for five years. See Quern v. Jordan, supra, at 348, n.20. Clearly, when the Jordan plaintiffs requested notice relief for the class members who had lost benefits on account of past violations of federal law, there was no ongoing or

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2. Of course in many circumstances even monetary relief may be available against individual state officials who are sued for past violations of federal law or infringement of federal rights, regardless of whether or not the wrong is a continuing one. See e.g., Scheuer v. Rhodes, 416 US 232, 237-238 (1974) (claim for damages against defendant state officials is not barred by the Eleventh Amendment, provided the state is not the real party in interest and subject to qualified executive immunity).

"future" conflict with current federal law. Nevertheless, the notice relief was granted because it ordered state officials only to perform an act (sending notices) which would not by itself cause any impact on the state treasury.

In short, this Court has expressly ruled that notice relief is a form of injunctive relief that does not violate the Eleventh Amendment. The Sixth Circuit opinion below holds that it does, and for that reason certiorari should be granted and the Court of Appeals should be reversed.

III. The decision below conflicts with the decisions of the Fourth, Fifth, and Ninth Circuit Courts of Appeal.

Four circuits other than the Sixth Circuit have faced the issue involved in these cases-- whether notice relief to remedy past violations of federal law may be granted consistent with the Eleventh Amendment despite the absence of any current conflict between federal and state law. The Fourth, Fifth and Ninth Circuits have approved notice relief under such circumstances. See Randall v. Lukhard, 729 F.2d 966 (4th Cir. 1984) (en banc) cert. denied, ___ US ___, 53 U.S. Law Week 3237 (Oct. 1, 1984); Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980) cert. denied sub. nom. Johnston v. Silva, 449 US 1125 (1981); and Beltran v. Myers, 701 F.2d 9 (9th Cir. 1983), cert. denied sub. nom. Rank v. Beltran, ___ US ___, 103 S.Ct. 3115 (1983). The Second Circuit has not allowed notice relief under those circumstances. See Colbeth v. Wilson, 707 F.2d 57 (2nd Cir. 1983), affirming 554 F.Supp. 539 (D. Vt. 1982).

In Beltran v. Myers, supra, California Medicaid applicants challenged, as violative of the Social Security Act, California's transfer-of-assets law under which they would

be rendered ineligible if they had transferred property within a certain period of time before their application. The district court and the Ninth Circuit Court of Appeals held the law to be consistent with federal law in effect at that time. See Dawson v. Myers, 622 F.2d 1304 (9th Cir. 1980). This Court granted certiorari, Beltran v. Myers, 451 US 625 (1981). While the case was pending in this Court, federal law changed in such a way that it appeared that "in the future the states will be permitted to impose transfer of assets restrictions generally similar to that of California." Id at 627. Consequently, this Court vacated and remanded the Court of Appeals' decision for reconsideration in light of the federal statutory change. Id at 628-629. Although the per curiam opinion of this Court was silent on the issue, four members of the Court, in a separate concurrence, said:

> On remand the Court of Appeals should, of course, consider the impact of the statutory change on the class members' future rights, but it also should determine what relief is appropriate to remedy the past violations. Cf. Quern v. Jordan, 440 US 332.

Id at 629.

Following the suggestion in the concurring opinion, the district court in Beltran reversed itself on the merits, held that California's transfer of assets law violated pre-change federal law, and ordered notice relief on behalf of all applicants who had lost benefits before the federal law change. Beltran v. Myers, No. 78-2350 CBM(Mx), [1982 Transfer Binder] CCH Medicare and Medicaid Guide ¶31,835 (C.D. Cal., Feb. 4, 1982). The Ninth Circuit affirmed, Beltran v. Myers, 701 F.2d 91 (9th Cir. 1983) and this Court denied certiorari. See Rank v. Beltran, ___ US ___, 103 S.Ct. 3155 (1983).

In Randall v. Lukhard, supra, Medicaid applicants in Virginia challenged a transfer-of-assets law similar to California's on grounds of its conflict with the same provisions of federal law involved in Beltran. The en banc Fourth Circuit held that Virginia's transfer-of-assets rule did not violate post-change federal law, but that it did violate pre-change federal law. Consequently, the Court of Appeals affirmed that portion of the district court's decision that granted declaratory and notice relief on behalf of applicants who applied for Medicaid before the new federal law went into effect. Certiorari was denied by this Court. ___ US ___, 53 U.S. Law Week 3237 (Oct. 1, 1984). See also Simpson v. Miller, 93 F.R.D. 450 (N.D. Ill. 1982) (district court held Illinois child care policy in violation of old federal law and ordered notice relief despite state's compliance with new federal law).

In Silva v. Vowell, supra, no change in federal law was involved as in Beltran and Randall. However, voluntary state compliance with federal law eliminated any future conflict between federal and state law. Despite state arguments that notice relief would violate the Eleventh Amendment under the circumstances of that case, the Fifth Circuit held that it should be ordered on behalf of class members who lost benefits before the state voluntarily came into compliance with federal law.

On the other side of the issue are the cases at bar and Colbeth v. Wilson, 554 F.Supp. 539 (D. Vt. 1982), aff'd per curiam sub. nom. Colbeth v. O'Rourke, 707 F.2d 57 (2nd Cir. 1983). In Colbeth, plaintiff food stamp recipients challenged a state food stamp regulation that restricted eligibility allegedly in violation of the federal Food Stamp Act. However, while the case was

pending, federal law changed to authorize the challenged state eligibility practice. In rejecting plaintiff's request for declaratory and notice relief on behalf of recipients who lost benefits before the change in federal law, the district court held that the Eleventh Amendment would "bar any form of retroactive relief," including notice relief. See 554 F.Supp. at 544.

At this point the Fourth, Fifth, and Ninth Circuits have allowed injunctive orders for notice relief (to remedy past violations of federal law) without requiring that the notice be tied to an ongoing injunction (to remedy current violations of federal law). The Second and Sixth Circuits have denied notice relief where no injunction to restrain continuing violations of federal law was possible. Given the split in the Courts of Appeal, this Court should grant certiorari, reverse the Sixth Circuit, and reaffirm the principle that when federal rights are infringed by state officials, in the present or in the past, the Eleventh Amendment bars only injunctive relief that will have a direct impact on the state treasury, and not notice relief of the kind approved in Quern v. Jordan, supra.

The issue raised by this petition has come up repeatedly in the district courts and is likely to come up again and again in the welfare area alone. Every time state officials violate federal law, and welfare recipients seek relief in federal court, part of the plaintiff class is left with no remedy absent notice relief. As happened in Quern and here in Banas, the preliminary and/or permanent injunctions that were entered offered no protection to those plaintiffs whose welfare grants had already been wrongly cut or denied. The problem is especially acute in

times of restrictive social legislation, where, as here, state administrators try to reduce their welfare rolls by changing state regulations early in anticipation of changes in federal law.

IV. If the issue presented by these cases was left open in Quern v. Jordan, as the Sixth Circuit implies, then this Court should grant certiorari to resolve the matter once and for all.

The Sixth Circuit distinguished Quern on the grounds that in Quern a permanent injunction was entered before federal law changed. See Banas v. Dempsey, 742 F.2d 277, 286-287 (6th Cir. 1984). Appendix at 19.) Why this should make a difference for Eleventh Amendment purposes is unclear, but the Sixth Circuit found a justification for its distinction in this Court's statement in Quern that the notice relief there was "properly viewed as ancillary to the prospective relief already ordered by the [district] court." Quern, supra, at 349. Thus, according to the Sixth Circuit "[t]o escape the bar of the Eleventh Amendment, an order against state officials must be both 'prospective' and ancillary to" a permanent injunction restraining ongoing violations of federal law. Banas v. Dempsey, 742 F.2d 277, 288 (emphasis by the court). Appendix at 21.)

The Sixth Circuit assumed that the "prospective relief already ordered" in the Jordan litigation referred to the permanent injunction entered before federal law changed. The Court of Appeals failed to note, however, that the permanent injunction in Jordan related only to future AABD applications and remedied only ongoing violations of federal law. The injunction did nothing to protect or to settle the rights of the class members whose rights

had been violated in the past. To the contrary, it was the declaratory judgment which held that state officials had violated federal law in the past, and therefore only the declaratory judgment applied to the class members who later sought and were granted notice relief.

Although a declaratory judgment adjudicates past misconduct, it "governs the [state] officials' future conduct," Pennhurst II, 79 L.Ed.2d at 80, and thus comes within the "prospective compliance" exception to the Edelman stricture against retroactive monetary relief. See Milliken v. Bradley, 433 US 267, 289 (1977). Unlike the award of retroactive benefits struck down in Edelman, the original Jordan declaratory judgment survived this Court's review, and that substantive federal-question determination formed the basis for the notice relief granted by the district court on remand. Since the permanent injunction in Jordan did not and could not apply to the class members seeking notice relief, the only "prospective relief already granted" to which the notice relief could have been "ancillary" was the declaratory judgment.

If in fact Quern requires, as the Sixth Circuit held, not only that notice relief be independently beyond the sweep of the Eleventh Amendment (not a retroactive monetary award), but also that it be "ancillary" to relief other than declaratory relief, this requirement is not clearly stated in the Quern opinion. While in Jordan notice relief in fact supplemented non-declaratory relief previously granted to a sub-class of plaintiffs, the Sixth Circuit has taken what happened to be true in that case and elevated it to a constitutional requirement. As pointed out supra, Argument III, three different Circuit

Courts of Appeal have failed to find any such requirement in the Quern opinion and have approved entry of notice relief when no injunction against ongoing violations of federal law was possible. If this important question was left open in Quern, as the Sixth Circuit implies, then certiorari should be granted in the case at bar to resolve the issue once and for all.[3]

## CONCLUSION

For all of the above reasons, this Court should grant a writ of certiorari to review the decision of the Sixth Circuit, and the judgment of that court should be reversed.

Dated: January 15 1985

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3. Compare the Sixth Circuit's discussion of the term "ancillary", Banas v. Dempsey, 742 F.2d 277, 288 (5th Cir. 1984) with the Fifth Circuit's use of that term in Silva v. Lowell, 621 F.2d 640, 652 (5th Cir. 1980). At the very least the Circuit Courts of Appeal are at a loss to explain the meaning of the term and its effect upon Eleventh Amendment cases.

## APPENDIX


Court of Appeals Opinion . . . . . A-1

District Court Opinion in Ba-as . . . . . A-24

District Court Opinion in MWRO . . . . . A-40

Sixth Circuit Judgment . . . . . A-49

Sixth Circuit Order Denying Re-Hearing . . . . A-50

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1546

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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CAROL BANAS, et al.,
*Plaintiffs-Appellants,*

vs.

JOHN T. DEMPSEY,
*Defendant-Appellee.*

MICHIGAN WELFARE RIGHTS ORGANIZATION, et al.,
*Plaintiffs-Appellants,*

vs.

JOHN T. DEMPSEY,
*Defendant-Appellee.*

ON APPEAL from the United States District Court for the Eastern District of Michigan.

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Decided and Filed August 22, 1984 *

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Before: LIVELY, Chief Judge; JONES, Circuit Judge; HOLSCHUH, District Judge.*

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* The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

HOLSCHUH, District Judge. In *Quern v. Jordan*, 440 U.S. 332 (1979), the Supreme Court held, in a case in which the District Court had enjoined state officials from future violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment did not bar the additional relief of an order compelling the state officials to send notices to members of the plaintiff class of welfare recipients informing them of the availability of state administrative procedures to determine their eligibility for lost benefits. This appeal, a consolidation of two actions brought in the Eastern District of Michigan, presents questions involving the doctrine of mootness and, of more significance, the problem of under what circumstances a federal court can order a state official to give a *Quern*-type notice without violating the restrictions placed on Article III jurisdiction by the Eleventh Amendment.[1]

I.

Although both cases have given rise to the same important issues, the factual history of each case warrants separate discussion.

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[1] Plaintiffs in both cases seek remedies primarily under the civil rights statute, 42 U.S.C. § 1983, and the declaratory judgment statutes, 28 U.S.C. §§ 2201-02. Plaintiffs allege jurisdiction of the federal court under both 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331. Although the parties have not questioned the jurisdiction of the federal court, we note that in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the Supreme Court held that 28 U.S.C. § 1343 does not provide subject-matter jurisdiction to hear a case based solely on a claim that state law conflicts with the Social Security Act, because an alleged violation of the Supremacy Clause "does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343(3)," 441 U.S. at 613, and the Social Security Act is not a statute providing for "equal rights" within the meaning of § 1343(3) or "civil rights" within the meaning of 1343(4), 441 U.S. at 617-18.

In the present cases, however, the plaintiffs, in addition to the alleged violations of the Supremacy Clause, the statutory claims, also allege not "wholly insubstantial" federal constitutional (equal protection or due process) claims, which could support the court's exercise of pendent jurisdiction over the statutory claims under 28 U.S.C. § 1343. *Hagans v. Lavine*, 415 U.S. 528 (1974), apart from plaintiffs' claim of jurisdiction under 28 U.S.C. § 1331.

A.

Plaintiffs, Michigan Welfare Rights Organization (MWRO) and Gail Blessing, filed a class action complaint on April 11, 1980, seeking relief primarily under 42 U.S.C. § 1983, and challenging certain policies of defendant, the Director of the Michigan Department of Social Services (MDSS), relating to the provision of day care benefits for employed Aid to Families with Dependent Children (AFDC) recipients.

Plaintiffs alleged in count I of their complaint that by wrongfully refusing to deduct from plaintiffs' incomes child care costs necessitated by working parents' needs to be at their places of employment, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. In count II, plaintiffs asserted that in failing to inform them properly of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits, defendant was violating not only federal regulations but also the due process clause of the Fourteenth Amendment. Plaintiffs' third claim for relief alleged a denial of equal protection as a result of the acts alleged in count I.

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income any expenses reasonably attributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant refused

to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income. Defendant contended that the state could do so because it already provided day care services to recipients without cost.

Effective October 1, 1981, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602(a), to provide that the state agency shall disregard from earned income expenditures, not exceeding specified amounts, required to be incurred for care of a dependent child,[9] and defendant implemented policies, also effective October 1, 1981, consistent with these amended provisions. On January 29, 1982, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. They also sought an order against defendant state official requiring the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979). Defendant, on February 1, 1982, moved to dismiss the action, arguing that the federal law change had rendered the pre-October 1, 1981, claims moot and that the Eleventh Amendment barred any other relief, including an order requiring issuance of a *Quern*-type notice to persons who had lost benefits as a result of defendant's actions.

At the March 9, 1982, hearing on plaintiffs' motions for summary judgment and class certification and defendant's motion to dismiss, plaintiffs made no claim that state law violated the Social Security Act's child care expense provisions after October 1, 1981. Plaintiff's counsel admitted, on the record, that plaintiff's claims for declaratory and notice relief, if valid at all, related only to benefits allegedly lost prior to October 1, 1981.

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[9] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357-813 (1981).

The District Court on June 22, 1982, denied plaintiffs' motions for summary judgment and class certification and granted defendant's motion to dismiss the action. It is from these rulings that plaintiffs in *MWRO* appealed.

B.

On May 11, 1981, Carol Banas and eight other named plaintiffs filed a class action complaint, seeking relief primarily under 42 U.S.C. § 1983, and challenging in count I of their complaint the constitutionality of a section of the Michigan Poor Law, which, along with policies of the defendant Director of the MDSS, required that income of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who lived in the same household as the stepparent. Plaintiffs claimed the statute and policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto.

Plaintiffs asserted in count II an equal protection violation as a result of a section of the Michigan Poor Law that allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits. In count III plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiff's rights of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they were already married and by encouraging prospective stepparents not to marry.

Plaintiffs contended in count IV that defendant's policies permitted dependent children and their caretaker relatives, except for stepparents, to deduct from gross earned income all actual expenses of producing that income. State regulations were alleged to require eighty percent of the gross earnings of a stepparent to be automatically counted as avail-

able income without allowing for any work expense deductions. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

On May 28, 1981, plaintiffs filed a motion for a preliminary injunction, seeking to enjoin defendant from enforcing the challenged policies and practices regarding stepparents' incomes. The District Court granted plaintiffs' motion for a preliminary injunction, which ruling was then appealed to this Court.

Effective October 1, 1981, and before the appeal from the District Court's preliminary injunction could be heard, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602(a), to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC.[4] As a result of this change in the law, the parties stipulated to amend the preliminary injunction order, making its prospective effect valid only up to October 1, 1981. The District Court amended the preliminary injunction order to comport with the parties' stipulation, and on October 27, 1981, defendant voluntarily dismissed his appeal of the preliminary injunction order.

Defendant, on March 19, 1982, filed a motion to dismiss the action, arguing that plaintiffs' action was mooted by the amend-

[4] See supra note 2.

ment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any orders sought by plaintiffs. Plaintiffs, on April 9, 1982, filed their motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979).

At the hearing conducted on April 13, 1982, plaintiffs admitted that the change in federal law mooted their claims for injunctive relief after October 1, 1981. Nevertheless, plaintiffs did not abandon their motions for class certification and summary judgment.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying plaintiffs' motions for summary judgment and class certification and granting defendant's motion to dismiss the action. Plaintiffs appealed this decision jointly with the decision in the *MWRO* case.

## II.

The District Court relied on both the mootness doctrine and the Eleventh Amendment in granting defendant's motions to dismiss both the *MWRO* case and the *Bonas* case. The District Court concluded that the October 1, 1981, amendments to the Social Security Act rendered plaintiffs' claims moot. Although the District Court did not develop its reasoning concerning the Article III "case or controversy" requirement, it apparently relied upon plaintiffs' admissions that they were not claiming any violation of federal law by defendant after October 1, 1981.

With respect to the request for an order directing the sending of a notice to persons who had lost benefits as a result of defendant's actions, the type of notice discussed in *Quern* v. *Jordan*, 440 U.S. 332 (1979), the District Court

concluded that the notice relief authorized by the Supreme Court in *Quern* had to be ancillary to prospective relief already granted. Finding that "plaintiffs have not obtained and could not obtain any prospective relief upon which to base an ancillary order requiring *Quern* type notice," the District Court held that the Eleventh Amendment barred any order requiring notice to the putative classes in these cases. Finally, the District Court, in light of these rulings, denied the class certification motions as moot.

## III

The threshold issue presented by these consolidated appeals is whether the change in the law effective October 1, 1981, rendered plaintiffs' actions entirely moot. The mootness doctrine, one facet of the case-or-controversy requirement of Article III, has two separate components. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest ['personal stake'] in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980), (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

The primary relief sought by plaintiffs in both cases was an injunction to prevent the defendant Director of the Michigan Department of Social Services from enforcing state practices that allegedly were in violation of plaintiffs' rights under the Fourteenth Amendment and in violation of the Supremacy Clause of the Constitution. It is clear, and plaintiffs' counsel admitted, that the change in federal law that occurred while these actions were pending rendered plaintiffs' requests for such injunctive relief moot.[4] As noted

[4] "Of course, injunctive relief is no longer possible and, of course, plaintiffs can possibly stipulate to the modification of the preliminary injunction, indicating that no prospective injunctive relief would be necessary and that, of course, the injunction which had been entered [in *Rowe*] should have no prospective effect after October 1st." Transcript of hearing held in the District Court April 13, 1982. (Joint Appendix at 180-81)

earlier, the parties stipulated to amend the preliminary injunction in *Banas*, and it was amended by the court so that it "should have no prospective effect on and after October 1, 1981."[9] Inasmuch as plaintiffs did not contend that defendant's post-October 1, 1981, practices violated any rights of plaintiffs, or that enforcement of defendant's previous policies was "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), a controversy no longer existed regarding defendant's conduct that would have permitted the granting of a *Young* injunction to force the state official to comply with federal constitutional and statutory law.

However, even though plaintiffs' primary claim for relief – an injunction to restrain conduct in violation of federal law – had become moot, it does not necessarily follow that there was no longer a case or controversy sufficient to support federal court jurisdiction under Article III of the Constitution. If, for example, plaintiffs, in addition to their claim for prospective injunctive relief, could also have asserted a claim for damages or restitution as a result of being deprived of welfare benefits, it is clear that such a claim would have saved their actions from the bar of mootness. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *McKenna* v. *Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981). In apparent recognition that a claim of this nature in the present case would have been barred by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiffs made no such claim. Instead, they sought an order directing defendant to send a *Quern*-type notice to members of the putative classes and, as the predicate for such an order, a declaratory judgment that defendant's prior conduct violated federal law.

Assuming, for the purpose of resolving the threshold question of mootness, that a declaratory judgment could have been

[9] Order Amending Preliminary Injunction, Joint Appendix at 46.

the predicate for the issuance of further relief in the form of a *Quern*-type order, it seems clear that, with respect to members of the putative class in *MWRO* who lost benefits as a result of defendant's conduct, the issues of whether the District Court should have certified the class, rendered a declaratory judgment that defendant's past conduct in denying plaintiffs' benefits was violative of federal law, and ordered the service of a *Quern*-type notice advising members of the putative class of possible claims under the state's administrative procedure statutes for the recovery of those benefits remained "live." Those who lost benefits to which they allegedly were entitled also had an interest in obtaining a resolution of that issue sufficient to satisfy the "personal stake" requirement.

The *Banas* case presents a more difficult question of whether there was any longer a "case of actual controversy"[6] in view of the fact that the named plaintiffs and many members of that putative class received, as a result of the litigation, the benefits to which they claimed entitlement.[7] The *Banas* plaintiffs who received their benefits nevertheless contend that the issue of whether defendant's past conduct violated federal law was still "live" as to them, and that they and members of the putative class who received the benefits still had a "personal stake" in the outcome, because it was conceivable that defendant would still try to recoup, as overpayments, the benefits paid.[8] Defendant responds by point-

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[6] An essential requirement for the ordering of a declaratory judgment, consistent with the jurisdictional requirement of Article III, is that there be "a case of actual controversy." 28 U.S.C. § 2201.

[7] Apparently, many of the persons in *Banas* who received benefits pursuant to the preliminary injunction also were provided voluntarily by defendant retroactive benefits for the period during which benefits had been lost prior to the preliminary injunction.

[8] The *Banas* plaintiffs concede that "[n]otice relief of the type contemplated for plaintiffs who lost benefits would mean little to the group who got benefits." It is argued, nonetheless, that a "different form of notice might still be appropriate," one that would simply

ing out that he not only has never sought to recoup any such benefits but has expressly waived any right to do so. Defendant further contends that, legally, he could not recoup benefits paid under an injunction, even if it were later determined that the injunction had been improvidently granted.

In our view, plaintiffs' assertion that defendant, contrary to his express representations and in light of his stipulation and dismissal of the appeal from the preliminary injunction, would attempt to recoup any benefits paid to the *Banas* plaintiffs or putative class members is purely conjectural. Accordingly, we conclude that, if all named plaintiffs and all putative class members had received benefits owed, there no longer would have remained in the *Banas* case "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). In such a case, having received the benefits to which they claimed to be entitled after filing their lawsuit, the *Banas* plaintiffs would have been under no threat of further injury as a result of defendant's conduct, *cf. Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), and, therefore would have lacked that "personal stake in the outcome" required to assure the concrete adverseness necessary for the resolution of constitutional questions. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

The record, however, seems clear that not all members of the putative class in *Banas* did in fact receive all the benefits lost as a result of defendant's conduct allegedly in violation of federal law. It appears that during the period from the effective date of defendant's policies, March 1, 1981, to the date the preliminary injunction became effective, June

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inform them that their entitlement to the benefits received under the preliminary injunction had been adjudicated by the federal court, "so that they would know to protest any attempt at recoupment."

1, 1981, some members of the putative class lost benefits as a result of those policies. To the extent that there remained putative class members who allegedly had lost benefits and had not yet been reimbursed, the *Banas* case could not have been considered moot, even though the named plaintiffs themselves no longer had a personal stake in the receipt of any lost benefits. *See United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980).[9]

Because we conclude that the complaints in *Banas* and *MWRO* should not have been dismissed, even after the change in federal law effective October 1, 1981, on mootness grounds, we are compelled to reach the Eleventh Amendment issue. Although the existence of the required case or controversy would have enabled the District Court to exercise its jurisdiction under Article III, the exercise of the judicial power conferred by Article III is clearly restricted, in actions brought against state officials, by the Eleventh Amendment.

## IV.

The Eleventh Amendment provides, as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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[9] The Federal Declaratory Judgment Act by its express language makes it clear that a court has certain discretion to grant or withhold declaratory relief. It provides, in pertinent part, that in "a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (emphasis added). Decisions of the Supreme Court have established the discretionary nature of this remedy. *Zemel* v. *Rusk*, 381 U.S. 1, 19 (1965); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324 (1961); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952). In the present cases, the District Court dismissed the actions on jurisdictional grounds and not as a result of exercising any discretion in the withholding of declaratory relief.

Despite the limited language of the Amendment, the immunity it provides to the states was extended at an early date to suits brought by a citizen against his or her own state, *Hans* v. *Louisiana*, 134 U.S. 1 (1890), on the reasoning that the Amendment exemplified the broader doctrine of sovereign immunity of the states and that such immunity is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Pennhurst State School & Hospital* v. *Halderman*, ___ U.S. ___, ___, 104 S. Ct. 900, 906, 79 L. Ed. 2d 67, 77 (1984). The jurisdictional bar prevents federal court actions, in the absence of consent, against a state or one of its agencies or departments, *Florida Department of Health* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Alabama* v. *Pugh*, 438 U.S. 781 (1978), and suits against state officials when the state is "the real substantial party in interest," *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945), regardless of the nature of the relief sought. *Cory* v. *White*, 457 U.S. 85, 91 (1982).

The present cases, brought against defendant in his official capacity as Director of the Michigan Department of Social Services, are effectively actions against the state, and would clearly be barred by the Eleventh Amendment but for the saving grace of *Ex parte Young*, 209 U.S. 123 (1908).[10] Because *Young* created an "exception" to the sovereign immunity bar to actions against the state, permitting the present

[10] The Eleventh Amendment does not bar actions for money damages arising from constitutional torts committed by state officials who are then sued in their individual capacities in federal court. Such actions, seeking to impose personal liability on the individual defendants, are not considered to be actions against the state. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In the cases on appeal, although brought against defendant "individually and in his official capacity as Director of Michigan Department of Social Services," it is clear that the only claims asserted against him are in his official capacity as the state official charged with enforcement of state law and policies allegedly in violation of federal law, and the only relief sought is declaratory, injunctive and notice relief.

actions to be filed, it is the rationale of the *Young* doctrine that provides the basis for determining the type of relief that can now be granted in these cases. This requires a brief review of that landmark decision and the later narrowing of its reach by subsequent decisions of the Supreme Court.

A.

In *Young*, the Court held that the Eleventh Amendment does not bar an action in federal court to enjoin a state official from enforcing a state statute that allegedly violates the Fourteenth Amendment. In what the Court has since recognized as a "fiction,"[11] the *Young* Court held that an unconstitutional enactment is "void" and thereby does not "impart to the state official any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U.S. at 160. Because the state could not authorize an unconstitutional action, the state official was "stripped of his official or representative character and [was] subjected to the consequences of his official conduct." *Id.*[12] If the state official were truly stripped of his official or representative character and subjected to the consequences of his official conduct, then no limitation would exist on the type of relief that could be granted. The Court, however, has never so held.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiff filed a class action seeking declaratory and injunctive relief against state officials who were administering the federal-state programs of Aid to the Aged, Blind, or Disabled in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. The District Court granted a perma-

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[11] *Pennhurst State School & Hosp.* v. *Halderman*, ____ U.S. at ____, 104 S. Ct. at 911, 79 L. Ed. 2d at 82.

[12] The "well-recognized irony" of *Young* is that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not state action under the Eleventh Amendment. *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (Stevens, J., plurality opinion).

nent injunction requiring the state officials to comply with the federal law and also ordered the state officials to pay benefits that had been wrongfully withheld. The Supreme Court agreed that *Young* permitted "that part of the District Court's judgment that prospectively enjoined [the state officials] from failing to process applications within the time limits established by the federal regulations." *Id.* at 664, but the Court held that *Young* did not permit the awarding of retroactive benefits, even if characterized as equitable restitution.

*Edelman* made it clear that the type of relief that can be granted under the *Young* exception to the Eleventh Amendment is limited. It noted that "[t]he relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment." *Id.* at 664. *Young*, therefore, clearly permits injunctive relief to compel state officials to comply with federal law, even if the cost of that future compliance requires the expenditure of money by the state. The "ancillary effect" on the state treasury in such cases is simply the consequence of state officials being forced to comply with federal law under a *Young* injunction. *Id.* at 668. The Court set forth its position as follows:

> Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective injunctive relief*. *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury*, *supra*.

*Id.* at 677 (emphasis added).

As the Court later pointed out in *Milliken* v. *Bradley*, 433 U.S. 267 (1977), *Edelman* "held that suit was proper to the

extent it sought 'payment of state funds . . . as a necessary consequence of *compliance in the future* with a substantive federal-question determination. . . .'" *Milliken*, 433 U.S. at 289 (emphasis added). The *Milliken* Court described this exception to the Eleventh Amendment as the "prospective-compliance exception" that "had its genesis in *Ex parte Young*." *Id.*

It is the power given federal courts under *Young* to grant injunctive relief, prospective in nature, against state officials to force compliance with federal law, that carries with it the power to issue additional orders, so long as they are ancillary to the injunction, without violating the Eleventh Amendment bar. For example, in *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978), the Court pointed out that "the . . . power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief."

This brings us to *Quern* and the "notice relief" authorized by that decision. Following the Supreme Court's remand in *Edelman*, the District Court ordered the state officials to send to each member of the plaintiff class a notice that informed the recipient, in pertinent part, that "you were denied public assistance to which you were entitled in the amount of $_____." *Jordan* v. *Trainor*, 405 F. Supp. 802, 809 (N.D. Ill. 1975). The mailing containing the notice also included a returnable "Notice of Appeal," which stated in relevant part that "[t]he department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled." *Id.* at 810. The Seventh Circuit Court of Appeals, sitting en banc, reversed the District Court's order on the ground that it constituted a "money judgment against the state" and, therefore, contravened the Eleventh Amendment. *Jordan* v. *Trainor*, 583 F.2d 873, 875 (7th Cir. 1977). The Court of Appeals reasoned that the language of the notice ordered by the District Court was objectionable in that it ordered, "in effect, the payment of state funds by retroactive award to

the members of the plaintiff class for past action or inaction by the State of Illinois." *Id.*

The Seventh Circuit did hold, however, that on remand the District Court could order the state officials to send a "mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided." *Treasur*, 563 F.2d at 875. The Supreme Court affirmed the en banc decision of the Seventh Circuit. *Quern* v. *Jordan*, 440 U.S. 332 (1979). Before reaching the pertinent issue in *Quern*, the Court restated the principles upon which its decision was based.

> In *Edelman* we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. 415 U.S., at 663; see *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944). We rejected the notion that simply because the lower court's grant of retroactive benefits had been styled "equitable restitution" it was permissible under the Eleventh Amendment. But we also pointed out that under the landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. 415 U.S., at 667-668; see *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977); *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974). The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference be-

> tween prospective relief on one hand and retrospective relief on the other.

*Quern*, 440 U.S. at 337 (footnote omitted).

The *Quern* Court was of the opinion that the notice relief approved by the Seventh Circuit "falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman side*." 440 U.S. at 347. In rejecting petitioner's argument "that giving the proposed notice will lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award," the *Quern* Court pointed out that the chain of causation linking the federal court's notice relief with any monetary award "contains numerous missing links, which can be supplied, if at all, only by the state and members of the plaintiff class and not by a federal court." *Quern*, 440 U.S. at 347. The Court further characterized the notice relief as follows:

> *The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court.* See *Milliken* v. *Bradley*, 433 U.S. at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue.

*Quern*, 440 U.S. at 349 (emphasis added).

Although the Justices sharply disagreed on the question of whether a state is a "person" for purposes of 42 U.S.C. § 1983, all were in agreement that the notice relief in *Quern* was ancillary to the prospective relief already ordered. "The Court today correctly rules that the explanatory notice approved by the Court of Appeals below is 'properly viewed as ancillary to . . . prospective relief.'" 440 U.S. at 350 (Brennan, J., concurring); "the explanatory notice approved

by the Court of Appeals clearly is ancillary to prospective relief." 440 U.S. at 388 (Marshall, J., concurring).

**B.**

In the present cases, plaintiffs, as a result of the change in federal law and defendant's conformance to the federal law, no longer had any ground for an injunction to prevent defendant from violating plaintiffs' rights under federal law, nor did they any longer seek such an injunction. The fundamental requirement of the *Young* doctrine, ongoing conduct by a state official allegedly in violation of federal law, that would have empowered the District Court to issue an injunction to force compliance with federal law as an exception to the jurisdictional bar of the Eleventh Amendment was simply no longer present. Thus, at the time the District Court dismissed the complaints, the foundation that supports the granting of ancillary orders against state officials without violating the Eleventh Amendment – the basic injunction to force compliance with federal law – was not present under the circumstances of these cases.

Without the foundation of a *Young* injunction to support a notice order, plaintiffs in the present cases nevertheless sought to have the District Court declare that the past conduct of the defendant state official had violated federal law for the sole purpose of ordering the state official to send *Quern*-type notices to members of the putative classes. Plaintiffs contend that the notice relief they seek could have been ordered consistent with the Eleventh Amendment because, as they argue, "[d]espite its apparently more expansive text, the Eleventh Amendment has long been held to be a bar only to money judgments and not to injunctive relief against the states. *Edelman* v. *Jordan*, 415 U.S. at 663, citing cases."[10] This reading of *Edelman*, however, has been expressly re-

[10] Appellants' brief, at 11-12.

jected by the Court in *Coey v. White*, 457 U.S. 85 (1961), in which the Court said,

> [Edelman] involved a suit against state officials claiming that their administration of a particular federal-state program was contrary to federal regulations and the Constitution. Among other things, the plaintiffs sought a judgment for benefits that had not been paid them. The case was against individual officers who allegedly were violating federal law, and it therefore arguably fell outside the reach of the Eleventh Amendment under *Ex parte Young*, 209 U.S. 123 (1908). *Edelman* held, however, that the case was in effect a suit against the State itself because a judgment payable from state funds was demanded. It was correctly noted that *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459 (1945), was authority for this result.
>
> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ." Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition.

*Id.* at 90-91 (footnote omitted).

It is only through the fiction of *Young* that injunctions may be issued against state officials and only when it is alleged that they are acting in a manner contrary to federal law. As the fiction creates the exception to the Eleventh Amendment bar, it also limits the remedies that can be awarded. A *Quern*-type order, when it does nothing more than advise plaintiffs of the Court's issuance of a *Young* injunction and administrative remedies that might be available to plaintiffs, is deemed ancillary to the *Young* relief permitted by the Eleventh Amendment. Consistent with the fiction of *Young*, an order compelling a state official to send such notices – if it is ancillary to the *Young* injunction and prospective in its application – is still not an action against the state itself.

It is not enough that the requested orders in the present cases would have operated "prospectively" in the same sense that the notice in *Quern* was "prospective," that is, compelling future action that did not involve an invasion of the state treasury for the purpose of payment for past wrongdoing. Even orders and injunctions against state officials that are purely prospective in this sense are subject to the prohibitions of the Eleventh Amendment. *Cory v. White*, 457 U.S. 85 (1981). To escape the bar of the Eleventh Amendment, an order against state officials must be both "prospective" *and* ancillary to a *Young* injunction ordering state officials to comply with federal law – the "prospective-compliance exception." *Milliken*, 433 U.S. at 289. Because it is the fiction of *Young* that shelters such ancillary orders from not being orders against the state, when the basis of that fiction – the need for injunctive relief to force state officials to comply with federal law – disappears, so does the shelter.

Plaintiffs argue that the "ancillary" statement at the end of the *Quern* opinion was an "afterthought," and that the Court did not intend to require that notice relief be ancillary to a *Young* injunction previously ordered. While it is true

that the Court has not always been consistent in its use of this word in Eleventh Amendment jurisprudence,[14] we do not view the statement as a thoughtless comment. To the contrary, for the reasons stated, the Court's finding of ancillarity was needed to bring the order within the preambles of the *Young* doctrine.

Finally, plaintiffs contend that if *Quern* requires notice relief to be "ancillary" to other prospective relief, then the notice relief requested in the present case could be considered ancillary to the preliminary injunction entered in *Bowen* or to the declaratory judgments sought in both *Bowen* and *MWRO*. The difficulty with this suggestion is that both remedies are inadequate to support the additional orders requested by plaintiffs. The *Bowen* injunction was expressly modified so that it would have no prospective effect after the change in law became effective on October 1, 1981. After that date, there was no conduct in violation of federal law to be enjoined, and thus the injunctive relief, which may have served as the predicate for an order requiring notice relief, had been eliminated. Any declaratory judgment in these cases would concern only the past conduct of the state official, a finding, in retrospect, that certain activities of the state official had previously violated plaintiffs' rights under federal law. In our view, such a declaration would not be prospective in nature, and therefore an order based solely on a declaration regarding the past conduct of the state official would not be an order falling within the "prospective-compliance" exception necessary to bring it "on the *Ex parte Young* side of the Eleventh Amendment". *Quern*, 440 U.S. at 347.

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[14] *Young* injunctions are permissible even though there is "an ancillary effect on the state treasury." *Edelman*, 415 U.S. at 668. "Costs and attorney's fees are properly treated as 'ancillary to the federal court's power to impose injunctive relief.'" *Hutto*, 437 U.S. at 691, notice relief is "ancillary to the prospective relief already ordered by the court." *Quern*, 440 U.S. at 350.

V.

These cases illustrate, as the Supreme Court acknowledged in *Edelman*, that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. The Supreme Court has also very recently observed that "the theory of *Young* has not been provided an expansive interpretation," *Pennhurst*, ____ U.S. at ____, 104 S. Ct. at 909, 79 L. Ed. 2d at 80, and the Court has emphasized the importance of recognizing that the principle of sovereign immunity of the states is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Id.* at ____, 104 S. Ct. at 906, 79 L. Ed. 2d at 77.

Under the unique circumstances of the present cases, we believe the District Judge was correct in his conclusion that at the time he ruled on the motions to dismiss, any further relief was barred by the Eleventh Amendment.

The judgment is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL BANAS, MICHAEL K. KELLEY, LINDA I. KELLEY, AMELIA VAN BURGER, TERESA E. COVEYOU, MARY MEDLENE JONES, JOHN J. KIEVER, GILDA MILLS and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated,

Plaintiffs,

v. Civil Action No. 81-60077

JOHN T. DEMPSEY, individually and in his official capacity as Director of the Michigan Department of Social Services, HON. CHARLES W. JOINER

Defendant.

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JUDGMENT

The plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22 1982.

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be dismissed on the merits, with prejudice.

ROBERT A. MOSSING

Clerk of Court

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL BANAS, MICHAEL K. KELLEY, LINDA I. KELLEY, AMELIA VAN BURGER, TERESA E. COVEYOU, MARY MEDLENE JONES, JOHN J. KIEVER, GILDA MILLS and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated,

Plaintiffs,

v. Civil Action No. 81-60077

JOHN T. DEMPSEY, individually and in his official capacity as Director of the Michigan Department of Social Services, HON. CHARLES W. JOINER

Defendant.

MEMORANDUM OPINION AND ORDER

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss. Since the facts of the case and its procedural development are important to an understanding of the court's ruling, they will be set out in some detail below.

I. FACTS

On May 11, 1981 the named plaintiffs filed suit "on behalf of themselves, their children and the class of all persons similarly situated." The class was defined as

being comprised of "all persons who live in households which will have their AFDC [Aid to Families with Dependent Children] benefits terminated or reduced because of the presence of a stepparent."

The complaint challenged an amendment to Section 2 of the Michigan Poor Law, MCLA 401.2, effective January 20, 1981, and Assistance Payment (AP) Manual Bulletin 81-5 and revised AP Item 208, effective March 1, 1981. Plaintiffs challenged as violative of federal statute and constitution the new policy implemented on March 1, 1981 by the Michigan Department of Social Services (MDSS) which required that incomes of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who live in the same household as the stepparent. Plaintiffs contended that the state's mandate that stepparent's income be automatically considered in computing eligibility for and amount of AFDC benefits violated the applicable provision of the Social Security Act, 42 U.S.C. § 602(a)(7), and regulations parsed under the Act. 45 C.F.R. §§ 233.90(a)(1) and 233.20(a)(3)(ii)(D).

Plaintiffs' first count asserted that the federal law required defendant to aid all "dependent children"; that in determining financial eligibility and the amount of assistance for a dependent child, defendant could only consider the net income and resources actually available to support the dependent child; that defendant could not lawfully assume the availability or resources of a stepparent when determining need or eligibility unless the stepparent was legally obligated to support the stepchild "under state law

of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children"; and that Michigan does not have such a law of general applicability imposing an absolute legal obligation on stepparents to support stepchildren to the same extent as is required of natural or adoptive parents.

Plaintiffs second count asserted an equal protection violation as a result of the revisions of the Michigan Poor Law, MCLA 401.2, which allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits.

Count III alleged that the state policy impermissibly burdened plaintiffs' right of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they are already married, and by encouraging prospective stepparents not to get married. Plaintiffs claimed these rights were violated because the Poor Act imposed the support duty on "the stepparent of a dependent child who lives in the same household."

Plaintiffs' fourth claim alleged another violation of federal law and equal protection. Plaintiffs contended that defendant's regular policies permited dependent children and their caretaker relatives to deduct from gross earned income all actual expenses of producing that income; plaintiffs

further asserted that the defendant permited an earned income disregard for persons qualified to receive one. Plaintiffs contended that defendant's policy applied unequally to step-parents because it did not permit the stepparent any work expense deductions or earned income disregards. Rather, 80% of the gross earnings of a stepparent was automatically counted as available income. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Act and equal protection guarantees.

Plaintiffs sought class certification; a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions; injunctive relief to enjoin defendant from continuing to enforce its practice; notification to all class members of their rights to an administrative review under state procedures, and; attorney's fees.

On May 28, 1981 plaintiffs filed a motion for a preliminary injunction. The motion was filed before the predecessor judge. Plaintiffs sought to enjoin, pending trial, defendant from continuing its complained of policy regarding stepparents' incomes. The motion was argued on June 16, 1981 and granted that day in a bench opinion. On June 29, 1981 a written order was issued. In pertinent part the order granting a preliminary injunction stated:

Plaintiffs have shown a strong or substantial liklihood of success on the merits inasmuch as it appears that Public Act 480 of 1980, MCLA 401.2 and the Defendant's policy as found in Assistance Payments Manual Item 208, require the assumption of income from a stepparent for the purpose of calculating Aid to Families with Dependent Children (AFDC) benefits and it appears that presuming income to be available for such purpose is violative of 42 U.S.C. § 602(a)(7) and the regulations promulgated thereunder, 45 C.F.R. 233.90(a)(1) because Public Act 480 of 1980, MCLA 401.2 is not a law of general applicability which legally obligates stepparents to support their spouse's children to the same extent that natural and adoptive parents are obligated to support their natural and adoptive children.

IT IS HEREBY ORDERED that, pending the final resolution of this case on its merits or until further order of the Court, the Defendant is preliminarily enjoined from assuming the availability of stepparent's income for the purpose of calculating AFDC benefits pursuant to Assistance Payments Manual Item 208.

IT IS FURTHER ORDERED that Defendant be and is hereby preliminarily enjoined from terminating, reducing, or denying AFDC or Medicaid benefits by reason of the assumption of the availability of stepparent's income to applicants or recipients of such benefits from and after the effective date of this order.

IT IS FINALLY ORDERED that Defendant, beginning in and for the month in which this order takes effect shall take the following actions:

(A) Reinstate all AFDC and Medicaid cases heretofore terminated because of the above enjoined policy;

(B) Raise all AFDC and Medicaid grants reduced because of the enjoined policy to their appropriate levels, and

(C) Re-evaluate the eligibility of AFDC and Medicaid applicants who were denied benefits solely by reason of the Defendant's use of Assistance Payments Manual Item 208 as modified because of the passage of 1980 PA 480.

By its own terms the order became effective June 1, 1981.

On July 1, 1981, defendant appealed the order granting a preliminary injunction to the Court of Appeals for the Sixth Circuit. Requests for stay of the order were made to both the trial and appellate courts but were denied.

On August 13, 1981 the President signed into law the Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, which amended the Social Security Act, 42 U.S.C. § 602(a), effective October 1, 1981, to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC. As a result of this change in the law, the parties stipulated to amend the preliminary injunctive order, making its prospective effect valid only up to October 1, 1981. On October 21, 1981, the court entered an order amending the order granting the preliminary injunction to comport with the parties' stipulation. On October 27, 1981 the defendant's appeal was voluntarily dismissed.

The parties' motions now before the court bring to issue a concern for the narrow, discrete period of time between March 1, 1981 through June 1, 1981. March 1, 1981 was the effective date of the defendant's complained of policies. On June 1, 1981 the predecessor judge's preliminary injunction took effect, prohibiting defendant from continuing its policies. The injunction protected plaintiffs from June 1, 1981 through October 1, 1981. Both sides agree that after October 1, 1981 an amendment to the federal law upon which plaintiffs based

their lawsuit ended all potential for plaintiffs' further prospective relief.

## II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

Plaintiffs' motion for summary judgment seeks to have this court decide the same issue that was preliminarily decided in their favor by the predecessor judge on their motion for a preliminary injunction. The legal arguments now presented by plaintiffs are substantially the same as these presented in their earlier motion. The difference is that now plaintiffs seek a declaration from this court that the past policies of defendant violated the law as it existed during March, April, and May of 1981.

The starting point for plaintiffs' motion is the then applicable section of the Social Security Act which plaintiffs assert defendant violated. Before its amendment section, 42 U.S.C. § 602(a)(7), provided:

> [T]he State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child or relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

Plaintiffs contend that the regulations promulgated under this section by the Department of Health and Human Services (HHS) and the cases that have interpreted this section require that before a state can deem the income of a stepparent

available to the stepchild there must be a state created general, unqualified obligation on stepparents to support their stepchild to the same degree as is imposed on natural or adoptive parents.

The then applicable federal regulation upon which plaintiffs rely, 45 C.F.R. § 233.90(a)(1), provided:

> The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State, nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household.
>
> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

(Emphasis added).

The amendment to the Michigan Poor Law, the basis for defendant's complained of change in policy, provided:

> The husband or wife of a poor person being of sufficient ability, shall relieve, maintain, and support the poor person, and the father and mother of a dependent child, and the stepparent of a dependent child who lives in the same household as the dependent child, being of sufficient ability, shall jointly or severally relieve, maintain and support the dependent child, in the manner * * * approved by the county department of social services of the county in which the poor person is settled or is living. (Emphasis added, reflecting amendment effective January 20, 1981).

MCLA 401.2. Based on this change in state law by the Michigan Legislature, defendant changed its policies effective March 1, 1981, as reflected in Assistance Payments (AP) Manual Bulletin 81-5 and AP Item 208.

Defendant's new policies created a uniform method of determining who was a "responsible and dependent relative" and of determining the amount of income from the "responsible realtive" that would be considered as available in determining the eligibility and need. The AP Manual Bulletin stated in pertinent part:

> A major simplification is in the area of the treatment of earned income. In the responsible and dependent relative processes, 80% of the responsible and dependent realtive's gross earnings are used to establish a net income amount. The 80% process incorporates all taxes and expenses and no separate calculation of these deductions is required to net income.

The relevant provision of AP Item 208 provided:

DEPARTMENT POLICY:

> A responsible relative, if financially able, is required to contribute to the support of his dependent relative who is a member of an ADC group. ADC group income may be diverted to a dependent relative of an ADC group member.
>
> A responsible relative is a person's spouse or the legal parent of an unemancipated minor child. The stepparent of an unemancipated minor child is the child's responsible relative while the stepparent and child live together.
>
> A dependent relative is a person's spouse or a person's unemancipated minor child. A person's unemancipated minor stepchild is a dependent relative when the stepparent and stepchild live together.

Plaintiffs contend that the amendment to Michigan's Poor Law did not create a legal obligation of general applicability upon stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Therefore, plaintiffs argue that defendant's change in policy violated the pre-amendment Social Security Act and the HHS regulations promulgated thereunder. Plaintiffs distinguish the stepparents' support obligation created by the Michigan Poor Law from the unrestricted and unconditional obligation of support Michigan places on natural or adoptive parents. As provided in MCLA 722.3:

> The parents are jointly and severally obligated to support a minor unless a court of competent jurisdiction modifies or terminates the obligation; or the minor is emancipated by operation of law except as otherwise ordered by a court of competent jurisdiction.

In MCLA 722.1 parents are defined as "natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate." Plaintiffs argue that this language differs greatly from the conditional stepparents' support obligation in the Poor Act. See also MCLA 722.3(2).

The plaintiffs rely upon DHS responses to other states' policies on stepparent support obligations and on case law construction of the preamended Social Security Act to support their assertion that they are entitled to the relief they seek. The court does not need to scrutinize plaintiffs' case analysis because the defendant's arguments raised in its motion to dismiss are dispositive.

Defendant's motion to dismiss argues that as a result of the amendment to the Social Security Act plaintiffs' claims are moot and the court is without jurisdiction to award any relief. Defendant contends that the change in federal law coupled with the Eleventh Amendment prohibition against awarding retrospective relief against a state requires dismissal of the case against them.

Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from the suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. Edelman v. Jordan, 415 U.S. 651(1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. See Graham v. Richardson, 403 U.S. 365 (1971) and Goldberg v. Kelly, 397 U.S. 254 (1970). However, in each instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to Ex Parte Young and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of Quern type notice relief, the court finds that the request is not ancillary to any valid, awardable prosepctive relief.

The court finds that since this case involves only retrospecitve relief, it differs materially from Quern, the primary case urged upon the court by plaintiffs as support for their argument that defendant should be required to provide notice to a class regarding its past illegal conduct. In Quern the Court was called upon to answer questions left open in their remand of Edelman v. Jordan, 415 U.S. 651 (1974). The Quern

Court upheld the Court of Appeals for the Seventh Circuit's modification of the district court's order requiring notification to class members concerning Illinois' illegal untimely processing of disability claims. However, the critical distinction between the plaintiffs in Edelman/Quern and the plaintiffs here is that the Edelman/Quern plaintiffs had already been certified as a class and had already been successful in obtaining a permanent injunction, granting them full prospective relief. As a consequence, the notice approved of by the Court in Quern was viewed as ancillary to the prospective relief already granted.

In stark contrast, the present plaintiffs have not succeeded in obtaining any prospective relief at all. Plaintiffs seek to have the court make a declaratory ruling in their favor concerning past conduct, certify a class, and require defendant to send a Quern type notice to all class members. The court finds that plaintiffs have not obtained and could not obtain any prospective relief upon which to base an ancillary order requiring Quern type notice.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of Ex Parte Young on the Eleventh Amendment and an application of the Supreme Court cases that have undertaken such an analysis dictate that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor.

Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as restrospective relief and because by their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. Quern v. Jordan, 440 U.S. 332 (1979).

Accordingly, defendant's motion to dismiss is granted and plaintiffs' motion for summary judgment is denied. The Eleventh Amendment and the mootness of this case mandate the court's ruling.

In view of the court's ruling on defendant's motion to dismiss, and plaintiffs' motion for summary judgment, the plaintiffs' motion for class certification is moot and, therefore, is denied.

CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN WELFARE RIGHTS ORGANIZATION, On behalf of its members, and GAIL BLESSING, individually, and both plaintiffs on behalf of all others similarly situated,

Plaintiffs,

Civil Action No. 80-60117

JOHNNY GREEN,

HON. CHARLES W. JOINER

Plaintiff-Intervenor,

v.

JOHN T. DEMPSEY, individually, and in his official capacity as Director, Michigan Department of Social Services,

Defendant.

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JUDGMENT

The plaintiffs motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22 , 1982,

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be disniss on the merits, with prejudice.

Robert A. Hossing

Clerk of the Court

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN WELFARE RIGHTS ORGANIZATION, On behalf of its members, and GAIL BLESSING, individually, and both plaintiffs on behalf of all others similarly situated,

Plaintiffs,

JOHNNY GREEN,

Plaintiff-Intervenor,

v. Civil Action No. 80-60117

JOHN T. DEMPSEY, individually and in his official capacity as Director, Michigan Department of Social Services, HON. CHARLES W. JOINER

Defendant.

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MEMORANDUM OPINION AND ORDER

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss.

The Act under scrutiny, commonly known as Aid to Families with Dependent Children (AFDC), is designed to assist needy families with children. The Act establishes an elaborate mechanism for state participation in the program. However, the process under inquiry herein, simply stated, requires the states first to apply federal guidelines to establish a family's need and then compare that need determination to the amount of income determined to be available to a family eligible for assistance under the program. The difference between the amount of need and the amount of available income provides the basis for establishing the amount of cash assistance to which the family will be entitled under the program. Of course, under this method of calculation the amount of income the family is deemed to earn is critical to the ultimate determination of the family's entitlement under the Act.

Both complaints sought recovery for the named plaintiffs and for those similarly situated.

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

The legal issue presented to the court is quite narrow. Plaintiffs seek a finding by the court that defendant's refusal to deduct from AFDC's family incomes the costs of child care violated 42 U.S.C. § 602(a)(7). When plaintiffs filed their suit, 42 U.S.C. § 602(a)(7) provided:

> [E]xcept as may be otherwise provided in clause (8), [a state plan for aid and services to needy families with children must] provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children... as well as any expenses reasonably attributable to the earning of any such income.... (Emphasis added).

See also 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i).

Plaintiffs argue that proper application of the statute required defendant to deduct from the incomes of AFDC

families the reasonable costs of child care. As noted at the outset, there are several other arguments raised by plaintiffs for the proposition that defendant failed to follow the law. However, the principal issue raised by plaintiffs concerns defendant's application of § 602(a)(7).

On August 13, 1981, Congress passed the Omnibus Reconciliation Act, Pub.L.No.97-35. Among other things, the Act modified the relevant provisions of the Social Security Act under scrutiny in this case. Effective October 1, 1981, 42 U.S.C. §§ 602(a)(8)(a)(ii) and (iii) were amended to provide that the state agency:

> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);
>
> (iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditutes for care in such month for a dependent child, or an incapacitated individual living in the same home as the dependent child, receiving aid to families with dependents children and requiring such care for such month, to the extent that such amount (for each such dependent child or incapacitated individual) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month)....

Because of these amendments to the Act and defendant's compliance with them, plaintiffs concede that

their claim for relief, if valid at all, relates only to benefits prior to October 1, 1981.

Defendant contends that the case should be dismissed as moot. It asserts that effective October 1, 1981 it changed its policies to be consistant with the amendments to the Act. Accordingly, defendant states that the Eleventh Amendment bars plaintiffs' recovery for retroactive benefits. On the other hand, plaintiffs present arguments to support their contention that defendant violated the pre-October, 1981 law and they assert that the case is not moot as to those pre-October, 1981 claims.

The court has carefully evaluated the motions, briefs, responses, and supplemental briefs of the parties. Since the court finds plaintiffs' claims are moot and barred by the Eleventh Amendment, it need not decide whether or not defendant's pre-October, 1981 interpretation of the Act violated the law as it then existed. None of the plaintiffs claim a right to prospective relief. There is no assertion that the defendant is presently violating the law with respect to child care expenses, and there is no claim that there has been a violation after October 1, 1981.

The court finds plaintiffs' claims for pre-October, 1981 benefits are moot. The Eleventh Amendment bars plaintiffs from recovering the relief they seek. Application of the Eleventh Amendment requires the court to dismiss the lawsuit since plaintiffs seek retrospective money damages.

Five years after the Supreme Court's decision in Chisholm v. Georgia, 2 Dall. 419 (1793), in which a state was held liable to suit by a citizen of another state or a foreign country, the Eleventh Amendment was adopted and has remained unchanged. It provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The clear intent of the amendment was to reduce jurisdiction and power of federal courts over the states and to smooth the relations between the states and the federal government. Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. Edelman v. Jordan, 415 U.S. 651(1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the SupremeCourt in Ex Parte Young, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. See Graham v. Richardson, 403 U.S. 365 (1971) and Goldberg v. Kelly, 397 U.S. 254 (1970). However, in each

instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to Ex Parte Young and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of Quern type notice relief, the court finds that the request is not ancillary to any valid, awardable prospective relief.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of Ex Parte Young on the Eleventh Amendment, and an application of all of the Supreme Court cases that have undertaken such an analysis, dictates that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor. Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as retrospective relief and because by their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. Quern v. Jordan, 440 U.S. 332(1979).

Accordingly, plaintiffs' motion for summary judgment is denied and defendant's motion to dismiss is granted.

II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

In view of the court's ruling on plaintiffs' motion for summary judgment and defendant's motion to dismiss, plaintiffs' motion for class certification is moot and is, therefore, denied.

CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: June 22, 1982
Ann Arbor, Michigan

NO. 82-1546

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

AUG 22 1984

JOHN P. HEHMAN, Clerk

CAROL BANAS, et al.,

Plaintiffs-Appellants,

v.

JOHN T. DEMPSEY,

Defendant-Appellee.

MICHIGAN WELFARE RIGHTS ORGANIZATION, et al.,

Plaintiffs-Appellants,

v.

JOHN T. DEMPSEY,

Defendant-Appellee.

Before: LIVELY, Chief Judge; JONES, Circuit Judge; and ROSCHUN, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party shall bear their own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

[illegible] October [illegible], [illegible]

[illegible]

John P. Hehman
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By [illegible]
Deputy Clerk

No. 82-1566

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

OCT 18 1984

JOHN P. HEHMAN, Clerk

CAROL BANAS, ET AL.,

Plaintiffs-Appellants

vs.

JOHN T. DEMPSEY,

Defendant-Appellee.

MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL.,

Plaintiffs-Appellants

vs.

JOHN T. DEMPSEY,

Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: LIVELY, Chief Judge; JONES, Circuit Judge; HOLSCHUH, District Judge*

A majority of the Court having not voted in favor of an en banc rehearing, the petition has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

*The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.